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January 12, 2000

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Comments of The Walt Disney Company in CS Docket No. 99-363

Dear Ms. Salas:

Enclosed for filing please find the original and nine (9) copies of the Comments of The Walt Disney Company in the above-referenced docket.

Please stamp and return to this office with the courier the enclosed extra copy of this filing designated for that purpose. Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosures

No. of Copies rec'd 0+9
List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Matter of:	)	
	)	
Implementation of the Satellite Home Viewer Improvement Act of 1999	)	CS Docket No. 99-363
	)	
Retransmission Consent Issues	)	

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COMMENTS OF
THE WALT DISNEY COMPANY

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January 12, 2000

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EXECUTIVE SUMMARY

On November 29, 1999, the Satellite Home Viewer Improvement Act of 1999 ("SHVIA") was enacted into law.[1] This legislation was intended to strengthen competition in the multichannel video programming distribution ("MVPD") market, principally by authorizing satellite carriers, most significantly direct broadcast satellite ("DBS") service providers, to retransmit local broadcast signals back into the market from which they originated. By enabling DBS providers to offer lawfully local broadcast signals for the first time, Congress correctly reasoned that DBS service would become a more substitutable service to cable and therefore be positioned to provide more robust, direct competition to cable.

In granting this right, however, Congress required that DBS providers obtain the consent of television broadcast stations to retransmit their broadcast signals. This fundamental retransmission consent requirement has been an integral part of the legal framework governing the relationship between broadcasters and MVPDs since enactment of the 1992 Cable Act.[2] During the intervening period, the retransmission consent regime has worked extremely well, governed by free market negotiations between broadcasters and MVPDs, mostly cable operators, with almost no government intrusion into this process. The retransmission consent process is not broken, and Congress, in SHVIA, did not decree that there be any fundamental change in how it functions or in the role of the Commission in administering it. Instead, in SHVIA, Congress simply codified the current FCC rules prohibiting exclusive retransmission consent agreements,[3] and added a very general duty to negotiate retransmission consent agreements in good faith. Congress sunset even that minimal obligation on January 1, 2006.

In imposing a "good faith" negotiation requirement, Congress adopted a term with a well established legal meaning. The concept has its origin in common law and has been used in a number of relevant contexts, including labor and bankruptcy law. Consistent core principles emerge from the jurisprudence when a duty to negotiate in good faith is present. Refusing to bargain in fact, refusing to confer at reasonable times, and refusing to execute a written contract once an agreement has been made are well established indicia of a failure to negotiate in good faith. The parties should not have a pre-determined intention of just going through the motions of a negotiating session without reaching agreement. On the other hand, good faith negotiation does not preclude "hard bargaining." Moreover, it does not require either side to agree to specific terms, or make concessions or even conclude an agreement. Finally, the duty to negotiate in good faith applies to both parties to the negotiations. A negotiation process that requires only one party to act in good faith inherently cannot be fair or honest.

The Commission's implementing rules for SHVIA pertaining to the duty to negotiate in good faith should encompass these key concepts. There is no suggestion that Congress wished the Commission to create a new definition out of whole cloth. Contrary to the Commission's apparent willingness, evidenced in the NPRM, to consider a detailed menu of behavior or substantive outcomes constituting bad faith, there is absolutely no warrant in SHVIA or its legislative history to do so.

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1 PL 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948 including the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999).

2 Section 325(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 325(b).

3 *See* 47 C.F.R. §76.64(m).

Likewise, both the language of the Act and its legislative history indicate that Congress did not intend for the Commission to immerse itself in the substance of retransmission consent agreements. Congress recognized that the parties on both sides of the negotiating table, the television broadcast stations and the MVPDs, are sophisticated entities. Both sides know how to negotiate and have substantial financial and human resources at their disposal to assist in their business dealings with other companies. Hundreds of retransmission consent agreements have been signed between broadcasters and cable operators since 1993. Recently, both DBS providers, DirecTV and Echostar, have reached agreements with broadcast networks for retransmission consent even before SHVIA's impact could be felt. There is absolutely no justification in law or the state of the marketplace for the Commission's rules to embody anything more than the lightest touch of regulation.

The detailed regulatory schemes surrounding the Commission' program access rules under Section 628 and its nondiscriminatory interconnection rules for local exchange carriers under Section 251 should not be used as a template by the Commission as it crafts rules implementing the duty to negotiate retransmission consent agreements in good faith. In each of those specific instances, Congress had imposed a specific nondiscrimination requirement in the statute, a standard explicitly rejected by the Congress in SHVIA. That nondiscrimination standard is wholly different from a general duty to negotiate in good faith. Both Sections 628 and 251 were enacted to remedy what Congress perceived to be specific anticompetitive abuses resulting from bottleneck control exercised by monopoly providers. By contrast, the market for broadcast programming is robustly competitive with six broadcast networks, hundreds of affiliates, myriad cable operators and two strong DBS providers, both of whom rank in the top ten MVPDs in terms of subscribers. It would be an error to draw upon Sections 628 and 251 as the basis for regulations implementing SHVIA.

Congress intended the term "competitive marketplace conditions" used in SHVIA to reflect the reality of today's network programming market and normal commercial practices where all parties have substantial negotiating skill and market power. Retransmission consent agreements result from free marketplace negotiations in which aggressive and hard bargaining is the norm and the antitrust laws protect against unlawful conduct. Absent extraordinary circumstances, there is no basis for inferring bad faith based on the negotiating position of a party.

Finally, the Commission should establish rules that provide for the swift resolution of disputes concerning allegations of violations of the good faith obligation in an FCC adjudicatory proceeding rather than using alternative dispute resolution mechanisms. The Commission's rules should impose a high burden of proof on the complainant to demonstrate a violation of the good faith negotiation obligation by clear and convincing evidence. Consistent with traditional tenets of American jurisprudence, this burden remains on the complainant and does not shift to the defendant during the course of the proceeding. To ensure that the Commission's limited resources are not wasted, it should vigorously enforce in this context its rules prohibiting the filing of frivolous pleadings.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Implementation of the Satellite Home Viewer Improvement Act of 1999	)	CS Docket No. 99-363
	)	
Retransmission Consent Issues	)	
	)	

COMMENTS OF
THE WALT DISNEY COMPANY

The Walt Disney Company ("TWDC") submits these Comments in response to the Commission's December 22, 1999 Notice of Proposed Rulemaking ("the NPRM") soliciting views on its implementation of certain aspects of the Satellite Home Viewer Improvement Act of 1999. These comments are timely filed within fourteen (14) days of the December 29, 1999 publication of the NPRM in the Federal Register.[4]

I. CONGRESS INTENDED THE FCC TO PROMULGATE RETRANSMISSION CONSENT RULES THAT EMBRACE THE FUNDAMENTAL NOTION OF GOOD FAITH, BUT STOP SHORT OF REQUIRING SPECIFIC TERMS, CONDITIONS OR PRICES, THE MAKING OF CONCESSIONS OR THE CONSUMMATION OF AGREEMENTS.

A. It is Evident that Congress Did Not Intend for the Commission to Micromanage Retransmission Consent Agreements Between Television Broadcast Stations and MVPDs When it Enacted SHVIA.

The plain text and the legislative history of SHVIA's amendments to Section 325(b) of the Communications Act of 1934 ("the Act") reveal that Congress specifically contemplated and sanctioned the continuation of business dealings between television broadcasters and MVPDs governed principally by marketplace forces with only the most minimal of FCC oversight. The sole requirement imposed by the legislation is an obligation to negotiate in good faith. The Act decidedly and deliberately imposed no requirements relating to the terms of the deals themselves.

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4 Notice of Proposed Rulemaking, 64 Fed. Reg. 72985 (Dec. 29, 1999) (hereinafter "NPRM").

The Conference Report provides, in pertinent part, that the Commission promulgate rules that shall:

> ... until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from .... failing to negotiate in good faith, and it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations.[5]

The Joint Explanatory Statement issued by the Conferees is determinedly brief in its description of the duty to negotiate in good faith, essentially reiterating the statutory formulation.[6]

In giving contours to the good faith requirement, Congress made clear that this requirement would <u>not</u> be violated by retransmission consent agreements containing different prices, terms and conditions, as determined by the parties based upon competitive marketplace considerations. In this scheme, the Commission's role is limited to ensuring that the negotiations proceed in good faith. The Commission is not empowered to become involved in the substance of the discussions because, to do so would restrict the freedom of the parties to arrive at appropriate prices, terms and conditions, as provided for in the legislation.

The centrality of nonregulation of the substantive terms of these agreements is reflected in a colloquy between Congressman Dingell, Ranking Democrat on the House Commerce Committee, and House Telecommunications Subcommittee Chairman Tauzin explaining that the far more regulatory House bill, which included a nondiscrimination provision, was intended to confer substantial freedom from regulation in practice:

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5 *See* Communications Act § 325(b)(3)(C), 47 U.S.C. § 325(b)(3)(C)(ii).

6 "The regulations would, until January 1, 2006, prohibit a television broadcast station from ... refusing to negotiate in good faith regarding retransmission consent agreements. A television station may generally offer different retransmission consent terms or conditions, including price terms, to different distributors. The [Commission] may determine that such different terms represent a failure to negotiate in good faith only if they are not based on competitive marketplace considerations." Joint Explanatory Statement at 13.

> [A] broadcast station could, for example, negotiate a cash payment from one video distributor for retransmission consent and reach an agreement with other distributors operating in the same market that contains different prices or other terms . . . [Indeed], as long as a station does not refuse to deal with any particular distributor, a station's insistence on different terms and conditions in retransmission agreements based on marketplace considerations is not intended to be prohibited by this bill . . . if a station negotiates in good faith with a distributor, the failure to reach an agreement with that distributor would not constitute a discriminatory act that is intended to be barred by this section.[7]

Congressman Berman expressed a similar view during House consideration of its more regulatory bill: "... [W]hile it is important that MVPDs have the opportunity to negotiate for retransmission consent, we do not in this bill subject the prices or other terms and conditions of nonexclusive retransmission consent agreements to FCC scrutiny."[8]

If there was little or no role for FCC scrutiny of the substance of these agreements under the House version of the bill containing a clear nondiscrimination requirement, one would be hard pressed to find a role for FCC scrutiny of the substantive elements of these retransmission consent agreements when Congress ultimately rejected the nondiscrimination standard in favor of the more permissive and less intrusive requirement that the negotiations only be conducted in good faith. Congress understood that enabling parties to enjoy the freedom to negotiate divergent private sector agreements will spur rather than inhibit competition in the MVPD marketplace. It also understood that there is no reason to impose strict, detailed requirements because broadcasters and MVPDs both have strong market-based incentives to enter retransmission consent agreements. Broadcasters want to enter multiple retransmission consent agreements because they want to distribute their programming to the widest possible viewing audience while MVPDs want to gain access to as much popular network programming as possible to increase their subscriber base. Moreover, the history of the retransmission consent regime demonstrates that intrusive government involvement is neither necessary nor desirable. The broad notion of good faith fulfills that purpose.

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[7] 145 Cong. Rec. H 2320 (daily ed. April 27, 1999) (colloquy between Telecommunications Trade and Consumer Protection Subcommittee Chairman Tauzin and Ranking Commerce Committee Member Dingell (D-MI).

[8] *Id* at page H2317 (daily ed. April 27, 1999) (statement of Representative Berman).

B. Congress Had A Clear Understanding of its Use of the Term Good Faith.

The Commission seeks comment on the criteria that should be employed to define "good faith."[9] "Good faith" is not a newfangled term-of-art without a clearly established meaning. To the contrary, "good faith" is a concept that runs through a number of areas of law, but with one central core meaning. When Congress uses a term with such a well defined meaning, it must be assumed that it intended to incorporate that meaning into its use of the term. There is no basis in the legislative directive for the Commission to fashion a new, detailed definition of the duty to negotiate in good faith.

The common law has given meaning to the contours of a duty to negotiate in good faith in cases where a statute[10], prior dealings between the parties[11] or a special relationship between parties[12] give rise to such duty.[13] In these circumstances, courts have defined good faith to mean "that state of mind denoting honesty of purpose, freedom from intention to defraud, absence of design to take an unconscionable advantage of another, and, where employed in connection with legal obligations, is evidenced by such candor and frankness in recognizing such obligations as reflect sincerity and willingness to perform them."[14] The good faith obligation requires parties to negotiate without any predetermined decision to merely go through the motions of the negotiations without intending to reach

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9 NPRM ¶ 15.

10 *See e.g.,In Re Coleman,* 21 F. Supp. 923,924 (W.D. Kentucky 1936).

11 *See e.g., A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chem. Corp.* 873 F.2d 155 (7th Cir. 1988).

12 *See e.g., Helms v. Duckworth*, 249 F.2d 482, 486 (D.C. Cir. 1957).

13 *See Pantzer v. Shields Dev. Co.* 660 F.Supp. 56 (Del. Cir. 1986) (holding that the court can find no authority for the proposition that a duty to act in good faith arises during negotiations, unless there is a specific agreement to negotiate in good faith); *Liu v. Price Waterhouse LLP et. al.* No. 97 CV 3093 1999 US Dist LEXIS 16559 (noting that the scope of a duty to negotiate in good faith arises not from principles of common law, but from prior agreements or letters of intent). When such letters of intent exist, the extent of a party's obligation to negotiate in good faith can only be determined from those letters. *See A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chem. Corp.* 873 F.2d 155 (7th Cir. 1988).

14 *In Re Coleman,* 21 F. Supp. 923,924 (W.D. Kentucky 1936) (defining good faith under the National Bankruptcy Act and finding that as the term was not defined in the statute it is to be given no technical or refined meaning...in common usage it has a well-defined and generally understood meaning).

an agreement.[15] In essence, the common law teaches that the duty of good faith is violated only when a party to a negotiation engages in a refusal to deal.

Similar principles can be found in decisions giving meaning to the "good faith" requirement in the context of federal labor law, which requires employers and employee representatives to confer in good faith and bargain collectively. Section 8(d) of the National Labor Relations Act ("NLRA") defines collective bargaining as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.[16] Pursuant to their duty to bargain, employers and unions must meet, confer and negotiate, bargain over mandatory subjects, and deal in good faith.[17] To satisfy the requirement, good faith requires an employer to negotiate with the union with a sincere desire to reach agreement.[18] Moreover, employers are under a duty to vest negotiators with the authority to enter into a contract.[19]

While labor law requires parties to meet and bargain, there is absolutely no obligation that they reach a deal. The mere fact that a party adamantly insists on a bargaining position, or has not budged from its position on most issues, cannot suffice to render it guilty of a refusal to bargain in good faith.[20] Even regressive bargaining is not inconsistent with good faith negotiation. "[W]hile a union may lawfully make demands designed to improve existing employee wages and benefits, there is nothing in the NLRA which denies an employer the right, for its part, to demand givebacks.[21] Employers are not required to

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15 *See Helms v. Duckworth*, 249 F.2d 482, 486 (D.C. Cir. 1957) (defining good faith when contracting parties are fiduciaries).

16 29 U.S.C. 158(d) (emphasis added).

17 Wagner Act, Section 8(d), NLRB, 1937 Annual Report 82, 82-85 (1937), Hardin, *The Developing Labor Law* 593 n. 41 (3d ed., vol. 1 1992).

18 *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943).

19 *Cablevision Indus.*, 283 NLRB (1987)

20 *U.S. Gypsum Co. v. NLRB*, 484 F.2d 108, 84 LRRM (BNA) Cases 2129, 2131 (8th Cir. 1973).

21 *Roman Iron Works, Inc.*, 275 N.L.R.B. 449, 452 (1985).

agree to the union's proposals or to make concessions. Similarly, an employer cannot be required to agree to anything it finds unacceptable. The NLRA does not compel any agreement whatsoever between employees and employers."[22] As a result, in administering the good faith requirement the NLRA does not involve itself in "regulat[ing] the substantive terms governing wages, hours, and working conditions which are incorporated in an agreement."[23] The Government does not dictate terms[24] or impose its own views of a desirable settlement.[25] "[T]he fact that extensive negotiations fail to produce a contract does not justify an inference that the company is engaged in surface bargaining, since the Act does not compel the parties to reach an agreement."[26]

These same essential tenets of good faith serve as the basis of the meaning of good faith in the bankruptcy context. As in SHVIA, the statutory term "good faith" is not specifically defined under the Bankruptcy Act. In applying that term, bankruptcy courts consistent with common law and labor law precedent, generally adopt and utilize the definition contained in the Uniform Commercial Code, Section 1-201(19), which states that good faith be "honesty in fact in the conduct or transaction concerned."[27]

C. The Commission's Definition of the Duty to Negotiate Retransmission Consent Agreements in Good Faith Should Be Premised on the Core Principles Found in Common Law and Labor Law.

Against this background of a well-established core meaning of the term, there is no basis to assume that Congress intended the Commission to break new ground in this rulemaking in defining the legal term "good faith." Rather, by simply examining the abundance of precedent on the meaning of the term good faith, the Commission can apply recurring core principles that emerge to its interpretation of

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22 *NLRB v. American National Ins. Co.*, 343 U.S. 395 (1970).

23 *NLRB v. American National Ins. Co.*, 343 U.S. 395 (1970).

24 *Id.*

25 *H. K. Porter v. NLRB*, 397 U.S. 99, 103-104 (1970).

26 Hardin, *The Developing Labor Law* 619-620 (3d ed., vol. 1 1992).

27 See, *In re Ellingsen MacLean Oil Co., Inc.*, 834 F.2d 599, (6th Cir. 1987).

good faith in retransmission consent negotiations. In doing so, the Commission will give the proper meaning to the term good faith; the one that Congress intended.

Thus, in giving meaning to the term, the Commission's rules should embrace the fundamental requirement that the parties not have a pre-determined notion of "just going through the motions" of a negotiating session. Parties must do more than come to the bargaining table. The parties need to come to the table with a sincere desire to reach an agreement, and not simply engage in "sham bargaining."

That is the essence of the Dingell-Tauzin colloquy quoted above. Consistent with the guidance provided by labor law, the Commission should promulgate rules that define the essence of this duty to bargain in good faith is to avoid conduct that is tantamount to a refusal to bargain, such as bypassing completely the negotiating process, refusing to confer at reasonable times or refusing to execute a written contract once an agreement has been made. Similarly, refusing to vest a representative with the authorization to enter into an agreement would be evidence of a violation of the duty to negotiate in good faith. As in labor law, identifying the fundamental tenets of good faith will aid parties in negotiating without involving the Commission in micromanaging the process. Ensuring a fair process will eliminate any need to intrude into the substance of the agreements. As in labor law, the Commission should view the conduct of the parties by examining the "totality of the circumstances."[28]

In imposing these requirements it is equally important that the Commission steer clear of involving itself in the substance of the deals. It is the antithesis of both common law and labor law to permit the government to compel a party to agree to specific terms or make a concession or enter into an agreement. To do so would permit the Commission to inject itself into the negotiating sessions of private parties and pass judgment on substantive terms of the agreement. Congress did not intend any such intrusion into the retransmission consent process.

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28 *See, e.g., NLRB v. General Electric Co., 418 F.2d 736* (1969); *Montgomery Ward & Co.*, 133 F.2d 676, 686-87 (9th Cir, 1943). In testing the quality of the negotiations, the courts have found that refusing to offer a single counterproposal to several union proposals, and demonstrating an attitude of aloofness, disinterestedness, and unwillingness to go forward constitute a violation of the duty to bargain in good faith.

It also is important that the Commission place the duty to negotiate in good faith on both parties. In requiring a duty of good faith, Congress intended the process of negotiating retransmission consent agreements to be fair and honest. However, the process cannot work when one party has an obligation to negotiate in good faith and there is no corresponding duty is placed on the other party. The Commission should promote equality and responsibility in bargaining by making the duty to negotiate in good faith shared.

D. The Commission's Program Access and Section 251 Regulations Are Not Appropriate Bases for the Commission's Rules Implementing the Broad Duty to Negotiate Retransmission Consent Agreements In Good Faith; Not Only Are the Standards Imposed By Congress Different, The Underlying Marketplace Conditions Are Different As Well.

The Commission seeks comment on the applicability, if any, of its regulatory schemes implementing Section 628, program access, and Section 251 of the Communications Act of 1934, as amended.[29] The Commission's program access and Section 251 regulations implement different statutory standards than that present in SHVIA and were adopted to remedy clearly identified and documented marketplace failures arising from the exercise of monopoly power, circumstances not present here. They are not analogous to SHVIA and should not be used as a template or as guidance for the Commission's regulations implementing SHVIA's good faith requirement.

1. The Program Access Rules Contain a Nondiscrimination Standard Wholly Different From the Good Faith Standard in SHVIA.

In drafting the Cable Act of 1992, Congress specifically directed the Commission to adopt regulations to prohibit price discrimination. Specifically, Section 628(c) directs the Commission to promulgate regulations, that at a minimum:

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[29] NPRM ¶¶ 18, 19.

"... (B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups...".[30] [emphasis added.]

This statutory language is radically different from the general good faith negotiation requirement imposed by SHVIA. Unlike in the program access context, Congress did not direct the FCC to adopt retransmission consent rules that include a nondiscrimination standard when it passed SHVIA. To the contrary, Congress expressly permitted broadcasters to negotiate retransmission consent agreements containing different prices, terms and conditions.[31] Moreover, Section 628(c)(2)(B) deals only with vertically integrated cable companies, in an effort to curb the presumed incentives of such entities to act anticompetitively. Congress was concerned that programming vendors would favor their affiliated cable operators in the sale of cable programming, discriminating against new entrants challenging incumbent cable operators which previously enjoyed a local monopoly. There is nothing remotely comparable to this anticompetitive situation here. In the SHVIA context, there is a competitive market on both sides of the negotiations, broadcasters and MVPDs. The incentive for broadcasters is to distribute programming as widely as possible to MVPDs, not withhold it for competitive advantage.

2. The Commission's Section 251 Implementing Rules Are Premised On A Statutory Nondiscrimination Requirement and Mandate that the Same Prices, Terms and Conditions be Made Available to All Requesting Parties In An Effort to Demonopolize the Telephone Local Exchange Market.

Likewise, the mandate in Section 251 and the fundamentally different marketplace conditions that Section 251 was designed to address make a Section 251-like regulatory regime inapposite to SHVIA. Indeed, the NPRM itself recognizes that negotiations under Section 251 and SHVIA are different in "significant respects."[32]

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30 47 U.S.C. §548(c)(2)(B).

31 47 U.S.C. § 325(b)(3)(C)(ii).

32 NPRM ¶ 18 and n. 40.

Section 251(c)(1) of the Communications Act imposes

> the duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

In Section 251, although Congress required local exchange carriers to negotiate interconnection in good faith, the good faith obligation is tied throughout this provision to an explicit nondiscrimination requirement.[33] Indeed, nondiscrimination is so essential to Section 251 that Congress required incumbent local exchange carriers to make the same terms and conditions of an interconnection agreement available to other telecommunications carriers.[34] Such a scheme is almost diametrically opposite to that provided in SHVIA where different prices, terms and conditions are expressly permitted as part of good faith negotiations. SHVIA contains no comparable nondiscrimination requirement, and, in fact, that approach was explicitly rejected. In implementing Section 251 of the Communications Act, the Commission adopted a laundry list of detailed requirements describing what constituted good faith.[35] In the instance of Section 251, ILECs were required to open their local monopolies to competition, and therefore weaken their dominant position in the market; absent this provision, CLECs had almost no negotiating power. The ILECs had little if any economic incentive to reach an agreement. Hence, the Commission concluded it was necessary to impose more detailed regulations in this context to bring about good faith negotiations.

In contrast, Congress recognized that the competitive situation here is entirely different from the local telephone exchange market because both network broadcasters and satellite carriers have a strong incentive to enter into retransmission consent agreements. As a result, government intervention directing the substantive terms of a deal are not necessary. The broadcasters in the retransmission consent context

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[33] 47 U.S.C. § 251(c)(2)(D), (c)(3), (c)(4)(B) and (c)(6).

[34] 47 U.S.C. § 252(i).

[35] 47 C.F.R. 51.301. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carries and Commercial Mobile Radio Service Providers, First Report and Order*, 11 FCC Rcd 15499, 15571 (1996).

have no competitive incentive to hold their own programming hostage. Their success is dependent upon their ability to reach the broadest viewing audience possible. On the flipside, MVPDs have an incentive to enter into retransmission consent agreements and carry popular programming as a way of attracting and retaining subscribers. One party is not coming to the table without anything of value to offer. By expressly permitting different prices, terms and conditions, Congress recognized that the free market should be given an opportunity to work, and the scope of delegation to the FCC was accordingly narrow. In implementing SHVIA, the Commission should recognize competitive markets warrant something far less intrusive than the detailed regulations in the program access and Section 251 contexts.

E. The Term "Competitive Marketplace Considerations" Is Intended to Reflect Commercial Market Realities.

The Commission seeks comment on what constitutes "competitive marketplace considerations."[36] Congress intended this phrase to constrain the Commission's regulations. Congress recognized that different prices, terms and conditions in retransmission consent agreements were permissible in light of the commercial realities and practices in the marketplace. The parties on each side of the bargaining table are sophisticated entities. On one side, there are the broadcasting networks, which compete fiercely with each other (as well as with nonbroadcast programming services) and have enormous marketplace incentive to ensure the widest possible distribution of their programming. On the other side of the table sit the DBS providers, who want broadcast programming to enable them to compete more robustly with cable operators. These DBS companies are hardly business neophytes.

Following the recent consolidation in the DBS industry, the two remaining DBS providers have abundant financial resources, substantial and rapidly growing subscriber bases, both ranking in the top ten MVPDs in the nation, and experienced, talented and aggressive negotiators. DirecTV is the nation's largest satellite broadcaster, having absorbed smaller DBS companies USSB and Primestar in 1999. DirecTV is a unit of Hughes Electronics Corporation, which is owned by General Motors. DirecTV had a record year in 1999, acquiring customers at an impressive rate to end the year with over 8 million

[36] NPRM ¶ 19.

customers.[37] Echostar has become a leading satellite television service in its own right. In 1999 it added over 1.4 million subscribers to its subscriber base. This represents an increase of 63 percent over 1998. "The customer base for Echostar's DISH Network now stands at 3.4 million."[38] Companies of this magnitude are fully capable of handling themselves at a negotiating table.

Moreover, there is no need for the Commission to craft intrusive, detailed good faith regulations because the marketplace is working in regard to retransmission consent agreements without government intervention. Indeed, News Corps' Fox television stations division " has aggressively locked up most of its MSO and satellite deals in recent months, reaching agreements with AT&T, Comcast, MediaOne, Cablevision, DirecTV, Time Warner and Echostar.[39] In addition to its retransmission consent agreement with Fox, DirecTV has retransmission agreements with ABC and NBC.[40]

Congress was mindful of these marketplace realities in SHVIA when it expressly permitted differences in prices, terms and conditions of retransmission consent agreements based on "competitive marketplace conditions." The Joint Explanatory Statement is brief in its description of the Commission's role: "The [Commission] may determine that such different terms represent a failure to negotiate in good faith only if they are not based on competitive marketplace considerations."[41] The phrase "competitive marketplace considerations" was simply meant to reflect the reality of today's broadcast network programming market and the normal commercial business practices of the industry players.

Moreover, Congress inserted the term "competitive market conditions" to draw a contrast between the historically noncompetitive local telephone and the MVPD markets, on one hand, and the

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37 *DirecTV Ends Record-Breaking Year with More than 8 Million Customers,* DirecTV Press Release (January 6, 2000) http://www/directv.com/press.

38 *Echostar adds 1.4 million satellite customers in 1999,* Yahoo Finance (January 5, 2000). http://biz.yahoo.com.

39 Michael Schneider, *News Corp. Finds Time for a Deal,* Daily Variety (Dec. 29, 1999).

40 *DirecTV Cash Flow To Rise,* Consumer Electronics, December 27, 1999.

41 Joint Explanatory Statement at 13.

robustly competitive broadcast network programming market in which retransmission consent agreements are negotiated, on the other hand. Conspicuously absent from Sections 628 and 251 are any statutory references to "competitive marketplace conditions" because the telephone local exchange market and the MVPD market historically were not competitive. The nondiscrimination provisions contained in Sections 628 and 251 were market opening levers. By contrast, the use of the phrase "competitive marketplace considerations" in SHVIA evidences Congress' recognition that the market for the sale of broadcast programming is competitive, and normal commercial practices in such a marketplace are permitted without government intrusion.

II. THE COMMISSION'S RULES IMPLEMENTING THE SATELLITE HOME VIEWER IMPROVEMENT ACT OF 1999 SHOULD ADHERE TO THE STATUTE BY PROHIBITING EXCLUSIVE RETRANSMISSION CONSENT AGREEMENTS WITH ALL MVPDs UNTIL JANUARY 1, 2006 AND UPHOLD THE SUNSET OF SECTION 325(b)(3)(C)(iii).

Newly amended Section 325(b) of the Communications Act directs the Commission to commence a rulemaking proceeding that shall: "until January 1, 2006, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts...."[42] The Joint Explanatory Statement, explaining how the issue of exclusive retransmission consent agreements should be treated, states: "[t]he regulations would, until January 1, 2006, prohibit a television broadcast station from entering into an exclusive retransmission consent agreement with a multichannel video programming distributor ["MVPDs"]...."[43] Despite its conciseness on this issue, the Joint Explanatory Statement is as unambiguous as the actual statutory language in evidencing congressional intent to continue the prohibition on exclusive retransmission consent agreements between television broadcast stations and MVPDs. This directive was intended to codify the Commission's current regulatory prohibition barring exclusive retransmission consent agreements between television broadcast stations

[42] S. 1948, the Intellectual Property and Communications Omnibus Reform Act of 1999, Section 1009(a)(2)(C)(ii).

[43] Joint Explanatory Statement of the Committee of Conference on the Intellectual Property and Communications Omnibus Reform Act of 1999 at 13.

and MVPDs,[44] and to clarify that the exclusivity prohibition would apply when there are more than two MVPDs seeking retransmission consent agreements in the same market.

The Commission seeks comment on what activities would constitute "engaging in" exclusive contracts.[45] While the statute states that the regulations shall prohibit broadcasters and MPVDs from "engaging in" exclusive retransmission consent agreements, the Joint Explanatory Statement states that the regulations shall prohibit these parties from "entering into" exclusive retransmission consent agreements. The Commission notes the use of these phrases and seeks comment on their significance.[46] The statute and the Joint Explanatory Statement do not distinguish between the use of these two phrases; in fact, they are used interchangeably. These phrases are two sides of the same coin. The Commission should not attempt to read more into Congress' use of these synonymous phrases when, ultimately, they amount to a distinction without a difference. Congress did not intend any difference in the meaning of these phrases, and the Commission should not manufacture one without direction. Accordingly, the Commission should craft one rule that would prohibit television broadcast stations and MVPDs from entering into exclusive retransmission consent agreements.

The Commission seeks comment on whether it was Congress' intent to abrogate the Commission's rule prohibiting exclusive retransmission consent agreements for cable operators.[47] In addition to being clear in prohibiting exclusive retransmission agreements between television broadcast stations and MVPDs, Congress was equally unmistakable in its intent to limit the effect of the prohibition. Section 325(b)(3)(C)(ii) provides that the Commission's rulemaking shall "<u>until January 1, 2006</u>, prohibit a television broadcast station that provides retransmission consent from engaging in exclusive contracts... ."[48] [emphasis added].

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44 See, 47 C.F.R. § 76.64(m).

45 NPRM ¶ 23.

46 NPRM ¶ 23.

47 NPRM ¶ 24.

48 S. 1948, the Intellectual Property and Communications Omnibus Reform Act of 1999, Section 1009(a)(2)(C)(ii).

The starting point for any inquiry into congressional intent is the statute itself; if it is clear on its face, there is no need to resort to outside sources for its meaning.[49] Here, the statute unequivocally states the prohibition on exclusive retransmission contracts is to sunset on January 1, 2006, and it directs the Commission to craft rules that so provide. The statute does not bestow on the Commission the authority to extend the date of its rules beyond the January 1, 2006 time frame provided for in the statute. Therefore, TWDC urges the Commission to promulgate regulations that reflect a literal construction of the substantive law of Section 325(b)((3)(C)(ii).

III. THE FCC SHOULD ESTABLISH PROCEDURAL RULES TO ENSURE THE SWIFT RESOLUTION OF DISPUTES INVOLVING THE GOOD FAITH REQUIREMENT IN RETRANSMISSION CONSENT NEGOTIATIONS.

A. The Commission's Rules Should Follow Legal Precedent and Require the Complainant to Meet a Non-shifting Burden of Proof of Lack of Good Faith by Clear and Convincing Evidence.

The Commission should follow analogous legal precedent and require the complainant to meet a high burden of proof in alleging a violation of a duty to negotiate in good faith. This burden should require that the complainant establish by clear and convincing evidence that the defendant violated the duty to negotiate a private retransmission consent agreement in good faith.

In traditional American jurisprudence, the term "burden of proof" encompasses two related concepts.[50] The first concept is the burden of production, or the burden of going forward with the evidence. The plaintiff generally has the initial burden of production, and must produce evidence establishing the elements of his or her case. Notably and more important, however, is the second concept encompassed by the term "burden of proof," which is the burden of persuasion. This term means that the complainant has the onus of convincing the trier of fact of the elements of a case to a predetermined level of certainty. Although the level of certainty in civil cases often is expressed as a preponderance of the

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49 *See, Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842, 104 S. Ct.2778, 2781, 81 L. Ed. 2d 694 (1984).

50 *See Ambrose v. Wheatley*, 321 F. Supp. 1220, 1222 n.6 (D. Del. 1971).

evidence,[51] the Supreme Court has required plaintiffs to persuade by clear and convincing evidence in certain types of civil cases.[52] Significantly, common law in most jurisdictions requires fraud and mistake, or other claims where there is thought to be a special danger of deception, to be proven by clear and convincing evidence.[53] These situations are similar to alleging lack of good faith here because the allegation essentially is that one party is perpetuating a fraud on the other by appearing to negotiate but, in reality, refusing to deal. The burden of persuasion <u>never</u> shifts from one party to the other, at any stage of a proceeding.[54] Hence, the Commission should craft rules that follow this precedent and require a complainant to meet the burden of persuasion that the defendant violated the duty to negotiate in good faith. The Commission's rules should provide that this burden is met only by clear and convincing evidence.

B. An FCC Process, Rather Than Alternative Dispute Resolution, Should Be Created To Provide For Expeditious Resolution of Complaints.

The Commission seeks comment on what procedures it should employ to enforce its rules imposing a duty to negotiate retransmission consent agreements in good faith.[55] TWDC respectfully urges the Commission to craft rules that reflect the pro-competitive thrust of the statute by ensuring the expeditious resolution of disputes alleging a violation of the good faith requirement in retransmission consent negotiations between television broadcast stations and all MVPDs. Given that the Commission's rules should only deal with the process of the negotiations and not the substance of the agreements, an alternative dispute resolution mechanism ("ADR") is not necessary. The contentiousness which likely

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51 McCormick on Evidence § 339 (John W. Strong ed., 4th ed. 1992).

52 *See, Addington v. Texas*, 441 U.S. 418, 424 (1979); *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966).

53 *See, e.g., Hofmann v. Hofmann*, 446 N.E.2d 499, 506 (Ill. 1983) (requiring fraud to be proven by clear and convincing evidence); *see also* McCormick on Evidence § 340 (John W. Strong ed., 4th ed. 1992).

54 *See* McCormick on Evidence § 336 (John W. Strong ed., 4th ed. 1992); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Ambrose*, 321 F. Supp. at 1222 n.6.

55 NPRM ¶ 26.

would be a principal feature of an allegation of bad faith is far better addressed in a formal Commission proceeding than through ADR.

Both the nature of the dispute and the need for adjudicatory finality make a Commission proceeding the more appropriate course of action. The very basic nature and narrow scope of the good faith requirement should enable the Commission to resolve complaints expeditiously, without undue administrative burden, and, importantly, without taking the unnecessary step of elevating this to require new or special procedures. There should be virtually no need for extensive fact finding nor any inquiry into the substance of the agreement. Hence, the Commission should simply provide for the swift resolution of allegations of bad faith utilizing normal Commission procedures. Given the high burden that should be required to establish bad faith, many complaints will be able to be resolved summarily on the basis of pleadings.

C. There Must Be An Environment That Discourages the Filing of Frivolous Complaints.

The Commission must create an atmosphere where there is little incentive to file frivolous claims alleging a violation to negotiate retransmission consent agreements in good faith. A frivolous complaint is one "filed without any effort to ascertain or review the underlying facts" or "based on arguments that have been specifically rejected by the Commission ... or [having] no plausible basis for relief."[56] Filing a frivolous complaint already violates Commission rules and the Commission has reminded parties in the past about its rules prohibiting this activity.[57] Therefore, the Commission at this time should not shrink from liberally exercising its authority to impose sanctions against filers of frivolous pleadings in the future.[58] TWDC encourages the Commission to fully utilize its sanctions powers to curb such abuse, including the authority to strike pleadings;[59] to issue forfeitures for violations of Commission rules;[60] and

[56] *Implementation of Cable Television Consumer Protection Act*, 9 FCC Rcd. 2642, 2657 (1993).

[57] Public Notice, 11 FCC Rcd 3030 (1996).

[58] *See*, 47 C.F.R. § 1.52.

[59] 47 C.F.R. § 1.52.

[60] 47 U.S.C. § 503

to bring an action for attorney misconduct.[61]

IV. CONCLUSION

For the foregoing reasons, the Commission should implement the SHVIA as intended by Congress by promulgating rules that provide for a general, mutual duty to negotiate retransmission consent agreements between broadcasters and satellite carriers in good faith.

Respectfully submitted,

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61 *Opal Chadwell*, 2 FCC Rcd 3458 (1987); Order, 10 FCC Rcd 10330 (1995) (codifying attorney misconduct procedures announced in Opal Chadwell); 47 C.F.R. § 1.24.